No. 76-936

In the Supreme Court of the United States

OCTOBER TERM, 1976

EMPIRE GAS CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In October 1975, the Federal Energy Administration (FEA) issued subpoenas to petitioners for the purpose of determining their compliance with certain of FEA's regulations (10 C.F.R. Parts 210, 211, and 212). Petitioners have not complied with these subpoenas. On January 29, 1976, the United States instituted this suit in the United States District Court for the Western District of Missouri to obtain the enforcement of the subpoenas. The district court ordered that the subpoenas be enforced (Pet. Apps. B, pp. B-1 to B-8, and C, pp. C-1 to C-4). The Temporary Emergency Court of Appeals affirmed (Pet. App. A, pp. A-1 to A-19).

1. Petitioners concede that they are subject to regulation under 10 C.F.R. Parts 210, 211, and 212 (Pet. 9), and that the FEA has authority to issue subpoenas (Pet. 6-8, 14). Petitioners also do not challenge any attribute of the

subpoenas themselves (Pet. 14). Their principal defense to the enforcement of the subpoenas instead is that the regulations (10 C.F.R. Parts 210, 211, and 212) are unconstitutionally vague and arbitrary. But the court of appeals, relying on an unbroken line of authority, correctly held that petitioner's claim did not constitute a valid defense in a subpoena enforcement proceeding (Pet. App. A, p. A-8).

Petitioners acknowledge (Pet. 18) that the lower courts consistently have refused to examine the merits of a constitutional challenge to underlying statutes or regulations in a subpoena enforcement proceeding. See, *e.g., Securities and Exchange Commission* v. *Brigadoon Scotch Dist. Co.*, 480 F. 2d 1047, 1052 (C.A. 2), certiorari denied, 415 U.S. 915; *Securities and Exchange Commission* v. *Savage*, 513 F. 2d 188, 189 (C.A. 7); *Adams* v. *Federal Trade Commission*, 296 F. 2d 861, 864 (C.A. 8), certiorari denied, 369 U.S. 864; *Federal Maritime Commission* v. *Port of Seattle*, 521 F. 2d 431, 434 (C.A. 9); *United States* v. *Feaster*, 376 F. 2d 147, 149-150 (C.A. 5), certiorari denied, 389 U.S. 920; *American International Trading Co.* v. *Bagley*, 536 F. 2d 1196, 1198 (C.A. 7). Petitioners contend (Pet. 18), however, that all of these courts, like the courts below in this case, have misconstrued this Court's opinion in *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186 (see also *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501), and that review is necessary to correct this widespread misunderstanding.

But the unanimous view of the lower courts is in full accord with the opinions of this Court. In *Oklahoma Press Publishing Company*, the Secretary of Labor had issued subpoenas to investigate whether the activities of certain employers were covered by the Fair Labor Standards Act. The employers resisted enforcement of the subpoenas on the ground that the Fair Labor Standards Act, enacted pursuant to the Commerce Clause, could not constitutionally cover their activities. This Court held that

the subpoenas should be enforced without a prior determination of whether the Act covered or could cover the employers' activities. The Court pointed out that the acceptance of the petitioners' contention "would stop much if not all of investigation * * * at the threshold of inquiry * * *" (327 U.S. at 213). "It is enough," the Court said, "that the investigation be for a lawfully authorized purpose, within the power of Congress to command" (*id.* at 209).

Similarly, in *Endicott Johnson Corp.* a contractor had refused to comply with an administrative subpoena issued to determine compliance with the Walsh-Healey Public Contracts Act, on the ground that the business transactions sought to be investigated were not covered by the Act. This Court rejected that contention, stating (317 U.S. at 509; emphasis added; footnote omitted):

> [P]etitioner has advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, *but they are not of a kind that can be accepted as a defense against the subpoena.*

These principles apply with equal force here. The subpoenas are themselves valid and are a part of an investigation undertaken for a lawfully authorized purpose (Pet. App. A, p. A-9). The court below thus properly ordered that the subpoenas be enforced so that the investigation could proceed. The alleged constitutional infirmity of the underlying regulations is more appropriately raised as a defense to a determination by FEA, if any such determination is made, that a violation of the regulations has occurred. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

2. Petitioners also contend (Pet. 20-23) that the authority to continue the subpoena enforcement proceedings lapsed when the Federal Energy Administration Act of 1974 (FEAA), 88 Stat. 96, 15 U.S.C. (Supp. V) 761 *et seq.*,

expired on July 30, 1976.[1] This contention was properly rejected by the court of appeals in an opinion on which we rely (Pet. App. A, pp. A-14 to A-19).

As the court of appeals explained (Pet. App. A, pp. A-14 to A-16), the general savings statute, 1 U.S.C. 109, consistently has been construed to provide that pending enforcement proceedings, like the one here, survive the expiration of a temporary enactment. See, *e.g., United States* v. *California*, 504 F. 2d 750, 754 (T.E.C.A.), certiorari denied, 421 U.S. 1015; *Carpenters 46 County Conference Board* v. *Construction Industry Stabilization Committee*, 522 F. 2d 637 (T.E.C.A.); *State Trial Attorneys Association* v. *Flournoy*, 522 F. 2d 1406 (T.E.C.A.). That statute applies here to permit the investigation to proceed despite the expiration of the FEAA.

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[1]The United States instituted this suit on January 29, 1976, on behalf of the Administrator of the FEA, Frank G. Zarb, who had authority to issue subpoenas under both Section 13(e)(1) of FEAA, 15 U.S.C. (Supp. V) 772(e)(1), and Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 87 Stat. 633, as amended, 15 U.S.C. (Supp. V) 754(a)(1), which incorporates Section 206 of the Economic Stabilization Act of 1970 (ESA), 84 Stat. 800, as amended, 12 U.S.C. (Supp. V) 1904 note. On July 30, 1976, the FEAA expired (Pub. L. 94-332, 90 Stat. 784). The President thereafter established a Federal Energy Office (FEO) within the Executive Office and named Mr. Zarb as its Administrator. Executive Order 11930, 41 Fed. Reg. 32399. Mr. Zarb was given all the authority he previously had as Administrator of the FEA. *Ibid.* That authority included the subpoena enforcement power vested in the President by the EPAA and previously delegated to the FEA Administrator. See Executive Order 11790, 39 Fed. Reg. 23185. The United States, on behalf of Mr. Zarb as the Administrator of FEO, continued to maintain its suit against petitioners.

On August 14, 1976, the Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125, was signed into law; it extended the FEAA through December 31, 1977, and provided that this extension should be effective as of July 30, 1976. Section 112 of the Act, 90 Stat. 1132. The FEO thereafter was terminated by the President. Executive Order 11933, 41 Fed. Reg. 36641.

Aside from that, however, on August 14, 1976, the FEAA was extended through December 31, 1977 (see note 1, *supra*) and it is plain that in extending the Act Congress intended that the Federal Energy Administration would continue its functions in an uninterrupted fashion. The Conference Committee report on the extension of the Act explains (S. Conf. Rep. No. 94-1119, 94th Cong., 2d Sess. 68 (1976); emphasis added):

> The conferees completed their work on this legislation [the Energy Conservation and Production Act] on July 30, 1976. Because the conference report could not be filed and acted upon by both Houses and presented to the President before the expiration of the Agency, the conferees added language to the bill to make the extension retroactive. It is the intent of the conferees that this retroactive provision have the effect of permitting the organic Act to continue uninterrupted. *Further, it is the intent of the conferees that the Agency, its functions (including pending regulatory matters),* appointments and other personnel matters, prior obligations and programs, *shall be deemed to have continued uninterrupted despite the brief period between July 30th, 1976 and the effective date of this legislation.*[2]

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[2]At the same page of its report, the Conference Committee indicated that Congress approved and ratified the President's temporary transfer of the FEA's authority to the FEO Administrator (see note 1, *supra*):

> The conferees are aware that, because of the necessity to continue existing energy programs, the President issued Executive Order No. 11930 on July 30th establishing a Federal Energy Office (FEO) in the Executive Office of the President. The conferees do not intend to suggest that actions taken during the hiatus period by the FEO and consonant with the procedures required by the FEA Act would be invalid by this Act.

Thus, petitioners' reliance upon *Fleming* v. *Mohawk Wrecking & Lumber Company*, 331 U.S. 111, is misplaced. In *Fleming*, this Court upheld the President's transfer of subpoena enforcement

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.

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authority from the Federal Works Administrator, an officer appointed by the President and confirmed by the Senate, to the Temporary Controls Administrator, a juridical creation of the President. In language that is fully applicable to the situation here, the Court stressed that Congress subsequently had approved and ratified this transfer (331 U.S. at 118-119; footnote omitted):

> Any doubts * * * [about the validity of the transfer are] removed by the recognition by Congress in a recent appropriation of the status of the Temporary Controls Administrator. That recognition was an acceptance or ratification by Congress of the President's action * * *.

Moreover, the subpoena enforcement proceeding here was instituted under EPAA as well as the FEAA (see note 1, *supra*), and the FEO Administrator had authority under the former statute, notwithstanding the expiration of the latter, to continue that proceeding (Pet. App. A, pp. A-16 to A-17, A-18 to A-19; see *id.* at A-4 to A-5).